

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

COLUMBIA MEMORIAL HOSPITAL

and

Case No. 03-CA-132367

1199 SEIU, UNITED HEALTHCARE WORKERS EAST

**BRIEF OF THE EMPLOYER/RESPONDENT
COLUMBIA MEMORIAL HOSPITAL**

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FACTS

This case involves a series of information requests which by their express terms were made solely to allow the Union to prepare for a pending grievance. The request came from two sources, Union delegate, Kim Bishop, and then subsequently Union organizer, Timothy Rodgers. (See, GC Exhibit 4, 10 and 14). These requests by their express language were solely related to obtaining information necessary to process a grievance which was filed on March 20, 2014, and which challenged the Hospital's compliance with the contractual mandatory overtime procedures. (See, GC Exhibits 5, 10 and 14). This March 20, 2014 grievance was one of a series of grievances that had been filed over the previous year challenging the Hospital's nurse mandation procedures. Prior to the March 20, 2014 grievance, there were at least two (2) prior grievances on the same subject filed in the previous year, which reflect at least five (5) other instances where mandation was an issue. Both of these prior grievances challenged the Hospital's mandation procedure; however, each was resolved. (See, TT42-44, testimony of Kim Bishop).

Mandation is where the Hospital, after engaging in a process seeking to avoid mandatory overtime, requires a nurse to work overtime. The process is laid out in the Hospital's Nurse Coverage Plan. (See, Exhibit GC 8; TT-121-23, testimony of Kelly Sweeney).¹ The grievance at issue (see GC Exhibit 5), charged that the Hospital did not comply with its contractual mandation process, but did not specify specific dates as to

¹ The reference to TT indicates the trial transcript and the page for which the factual information was taken.

when the Union felt the Hospital had improperly required nurse overtime. However, Ms. Bishop filed an information request the day before, on March 19th, which specified three dates – March 6th, 7th and 18th, all within the Respondent's contractual 10 day limitation on filing grievances. Ms. Bishop as a Union delegate became aware of the issue when nurses involved in the mandation of overtime complained to her about the process, which led to the grievance. (See, TT 41, testimony of Kim Bishop).

On March 31, 2014, the Hospital provided a detailed and complete response to the information request concerning the Hospital's mandation of nurses to work overtime on March 6th, March 7th and March 18th (see, GC Exhibit 9). Due to the extensive amount of information required to be assembled, it took the Hospital until March 31st to provide responses to these requests specific to three (3) dates which was then provided to the Union (See, TT 127, testimony of Kelly Sweeney).

The response to the request for specific information on March 6th, 7th and 18th provided the Union with the information as to; (1) the process and procedures that the Hospital went into before requiring mandatory overtime, and (2) also provided the Union with the names of the outside non-bargaining unit nursing agencies that they contracted on those dates in order to avoid the mandation of nurses for overtime. (See, GC Exhibit 9, the Hospital's March 31, 2014 information response). The Union was satisfied with the Hospital's response to this portion of the information request. (See, TT 46-47, testimony of Kim Bishop). The Hospital did not provide information for the final two requests in Ms. Bishop's March 19, 2014 information mandation request. These demands requested:

- (1) Complete contracts for the nursing agencies the Hospital was required to contract with pursuant to a nurse coverage plan; and

(2) A year's worth of information regarding the mandation of nurses.

In regards to the information for a year's worth of information regarding mandation, the Hospital did not provide the information, as it deemed it not relevant, as it would not be relevant to the pending grievance, the asserted reason for the request, and as no additional grievances could be filed, as the information was well beyond the 10 day contractual period for the Union to bring a grievance. (Article 14 of Collective Bargaining Agreement, GC Exhibit 2). This was confirmed by Ms. Bishop who admitted that she knew that no additional grievances could be brought even if she had received this information. (See, TT 37-38, testimony of Kim Bishop). Moreover, the testimony at hearing revealed that there had been at least two (2) prior grievances over the Hospital's procedures in requesting mandation of nurses to work overtime, all of which were resolved. (See, TT 42-44, testimony of Kim Bishop). Also, Ms. Sweeney testified it would be onerous and burdensome for the Hospital to go back and recreate over a year's worth of mandation, impeding the operation of numerous nursing departments, as evidenced by the fact that it took 12 days for the Hospital to assemble the information for three dates requested in the March 19, 2014 request. (See, TT 126-132, testimony of Kelly Sweeney).

Despite the foregoing reasons for not responding to Ms. Bishop's demands, on April 1, 2014 Union organizer, Tim Rodgers, served a second information demand which requested substantially similar and even more detailed information about the mandation over the past year, but the asserted purpose for the request was for the processing of the March 20, 2014 grievance. (See, GC Exhibits 10 and 14, April 1, and April 16, 2014 information requests). At the time he served the demands, Mr. Rodgers was unaware of any mandation issues, and he testified the demands were related to three (3) dates in

March, 2014 that gave rise to the grievance. He never clarified to the Hospital that the demand was for any other purpose. (See, TT 90-91, 106-107, 109-110, testimony of Timothy Rodgers). The Hospital initially refused to provide the information (see, GC Exhibit 12, the Hospital's April 4, 2014 response) on the same grounds for which it refused to respond to Ms. Bishop's demand on the same subject. However, on April 21, 2014 in an effort to move the grievance forward, the Hospital provided information to the Union so that they could process the March 20th grievance.

This response provided the Union with information that (1) the Hospital used two (2) outside agencies to contract to provide nurses in an effort to avoid mandation, which in conjunction with the March 31, 2014 response provided the Union the names of the two (2) agencies it had contracted with; (2) that there had been 14 instances of mandation over the past year; (3) that the Hospital attempted to utilize agency nurses each time mandation was required; and (4) they followed the nursing plan when a mandation issue arose. (See, Exhibit R-1). However, the Hospital continued to assert objections to the relevancy of the demand for a year's worth of mandation information (see, TT 134, testimony of Kelly Sweeney and Exhibit R-1). Ms. Sweeney additionally testified that the request was burdensome, as it would impact the business operations of multiple departments. (See, TT 126-27 and 132-33).

At no time did either Mr. Rodgers or Ms. Bishop attempt to discuss the demands it objected to with Ms. Sweeney or clarify that they were for any purpose other than the pending grievance, despite the fact that the Union and the Hospital had ongoing collective bargaining relationship for over 10 years, which throughout that time both parties exercised their opportunities to discuss these matters when disputes arose; and despite the fact that

Ms. Sweeney was open to these discussions. (See, TT-132-33, testimony of Kelly Sweeney).

Thus, the Union never clarified to the Hospital that the information for a year's worth of mandation information was for any other purpose than the processing of the March 20, 2014 grievance. The Union never disclosed prior to the hearing that the request was necessary to police the contract, or to determine if the Hospital complied with its obligations under the contract.

Yet, despite the lack of notice, the Union at the hearing, for the first time, claimed that the request was for the purpose of contract enforcement – Despite never raising this basis prior to Hearing. The ALJ erroneously accepted the Union's tardy justification and gave them a nunc pro tunc justification for these requests.

ARGUMENT

POINT I

THE ALJ ERRORED IN PROVIDING A NUNC PRO TUNC BASIS FOR THE REQUEST FOR ONE (1) YEAR'S WORTH OF OVERTIME MANDATION INFORMATION

It is respectfully submitted that the ALJ erred in providing the union with a nunc pro tunc basis to justify their voluminous demand for one (1) year's worth of mandatory nurse overtime information. At no time prior to the hearing, had the Union claimed it needed this information to monitor compliance with the parties' Collective Bargaining Agreement, but rather only asserted that their purpose was to process a pending grievance, for which these documents would not be relevant.

Moreover, even if the Board accepts this nunc pro tunc justification, compliance still would not provide relevant information, as the union admitted, production of one (1) year's worth of information could not result in the filing of any additional grievances, as the claims would be beyond the 10 day contractual limitation for filing, and the Hospital's contractual obligations in regard to mandatory nurse overtime had been subject to at least two (2) grievances, all of which were resolved. A request must be reasonably necessary to the Union's function as the employees' representative. U.S. Postal Service, 307 NLRB 429 (1992). Here, as is set forth below, it is submitted, the Union and General Counsel failed to meet that burden.

Additionally, despite prior to the hearing justifying its request solely to process a pending grievance, for which the information was irrelevant to, the ALJ accepted the General Counsel and Union's argument, raised for the first time at hearing, that monitoring the contract was the undisclosed relevant reason for the requests. It is submitted this was an error, as the Hospital was never on notice of this purpose, the Union never clarified its demand upon the Hospital's objection; warranting the Hospital refusal to supply the voluminous amount of documentation necessary to respond to these demands. Thus, it is submitted the ALJ should have accepted the Hospital's argument that the lack of notice, coupled with the prior resolution of similar grievances, and that no additional grievances could be filed rendered these demands invalid and not relevant.

A. THE TESTIMONY AT TRIAL REBUTTED THE PRESUMPTION OF RELEVANCY, AS THE HOSPITAL WAS NOT ON NOTICE OF ANY RELEVANT PURPOSE FOR THE REQUEST.

A review of the language of the information requests at issue (see, GC Exhibits 10 and 14), as confirmed by the testimony of its authors, Union Representative Timothy Rodgers and Kim Bishop, reveals that the sole reason and basis for the information request at the time it was issued was to assist in the processing of one grievance, which was filed on March 20, 2014. (See, GC Exhibit 5). The request by its own express terms, was not a general request to police the contract, or to obtain information to insure enforcement of a particular contract provision, but only related that single grievance. As the year's worth of mandation information would not be relevant to the pending grievance, which only dealt with three (3) dates in March, 2014 for which the Hospital satisfied all of

the Union's information demands for the information related to those three (3) dates), and the Union never disclosed or clarified any other relevant purpose, the Hospital was justified in denying the request.

In making information requests, the Union must make clear the reason for the requested information, and if the Hospital was not given actual or contractual notice of the reasons for the request, the Union is not entitled to the information. Emery Industries, 268 NLRB 824 (1984). In determining relevancy, the following should be considered; (1) what reasons the union gave the employer about why the union wanted the information; and (2) the circumstances surrounding the information request to the extent they are reasonably calculated to put the employer on notice of a relevant purpose that the union has not specifically spelled out. See, supra, Emery Industries citing Brazos Electric Power Cooperative, 241 NLRB 1016 (1979).

Here, it is submitted that the Union never specifically stated that the request for a year's worth of mandation information was to police the contract or maintain compliance with the contractual mandation process. The only asserted reason was the processing of the March 20, 2014 grievance. The Hospital satisfied the requests that related to the specific dates in March 2014 when mandation was required, but objected to supplying a year's worth of mandation documentation. The Union never clarified either how this information was related to the pending grievance nor did they ever state it was for any other purpose other than the grievance.

Moreover, the circumstances surrounding this request also would not put the Hospital on notice that the purpose of the request was to ensure enforcement of the contract.

Union Representative Kim Bishop testified that there were other instances where nurses complained about the Hospital's requirement that they work mandatory overtime, but these were resolved with at least two (2) prior grievances. Thus, between June, 2013 and the filing of the underlying grievance herein on March 20, 2014, there has been several grievances filed regarding the mandation of nurses to work overtime, each of which was then resolved to both the Hospital and the Union's satisfaction.

It is respectfully submitted that this reveals that the Hospital was not put on notice that the Union's request for a year's worth of information regarding the mandation of nurse overtime was to police the contract, as they had already filed and resolved these issues over that one year period. Further, buttressing the lack of relevancy of these demands, is that the contractual time frame for bringing a grievance is 10 days from the time that the employee knew or should have known of the contract violation. Thus, this information not only was not brought to the attention of the Hospital, but this information would not be relevant for its stated purpose, the processing of grievances because all of the alleged acts were outside of this 10 day time frame.

B. THE HOSPITAL REBUTTED THE PRESUMPTION OF RELEVANCE THROUGH PROOF OF PRIOR MANDATION GRIEVANCES AND CONTRACTUAL LIMITATION.

Moreover, and further revealing that lack of a legitimate relevant purpose for such a burdensome request, is that Union representative Timothy Rogers, the author of the April 1st and 16th requests, testified he was unaware of any mandation issues at the time he requested this information. He claimed the first time that he was aware mandation occurred

was pursuant to the Hospital's April 21, 2014 response to his request. This reveals there was no relevant basis for the requests at issue, as the Union was unaware of any other mandation issues prior to March 2014, as it is submitted all prior issues regarding the Hospital's compliance with its contractual obligation, were resolved by the prior settled grievances. These prior grievances also reveal that the Union already had sufficient information to monitor the Hospital's compliance, as they were sufficiently informed to file these prior grievances. Thus, had there been any other issues, the Union was well aware of them, particularly as when overtime mandation occurs, it comes to the immediate attention of the nurses who are affected. As Kim Bishop, testified, nurses know immediately when they are being mandated and thus have ample time to bring this to the attention of the Union and grieve it if they felt the Hospital is not complying with its obligations.

Additionally, and further proof of the lack of relevancy, is that no additional grievances could be filed. As Ms. Bishop admitted, the Collective Bargaining Agreement requires that grievances be filed within 10 days of the action being challenged, or when the employee knew or should have known of the conduct. This provision would preclude any additional grievances being filed for the one (1) year's worth of information being requested.

Thus, the request for over one (1) year's worth of mandation data for the purpose of supporting the pending grievance, is not relevant, and did not put the Hospital on notice of its relevant purpose, as no further grievance could be filed due to the 10 day statute of limitations in the parties' Collective Bargaining Agreement, and in any event, all these issues, it is submitted, were resolved in the prior grievances. The demands for a year's

worth of mandation information is nothing more than a blunderbuss demand, with no legitimate purpose, which as explained in further detail below, would be burdensome for the Hospital to comply with. Moreover, the fact that no further grievance could be filed shows that it did not put the Hospital on notice of any relevant purpose.

Thus, it is respectfully submitted this proof rebuts the presumption of relevance and shows that the Hospital was not on notice of any relevant purpose, as any prior problems with the Hospital's mandation process were resolved within the prior grievances, and these demands were not relevant to process the grievance, or any future grievance, and as no further grievances could be filed due to the 10 day limitation in the Collective Bargaining Agreement. Thus, neither the express language of the demands gave notice of relevant purpose, nor the circumstances provided constructive notice to the Hospital.

Moreover, the Union failed to clarify the relevant purpose for which a year's worth of mandation information was requested; upon the Hospital's objection, instead of seeking a negotiated resolution, they just reiterated the same unexplained requests, and then filed with the NLRB when the Hospital rightfully refused to comply. This is improper, as the Union at the very least should have clarified its purpose. (See, i.e. Springfield Day Nursery, 2013 NLRB Lexis 189 (2013); aff'd. as modified 362 NLRB No. 30 [2015]).

Thus, based upon the foregoing the ALJ's decision should be reversed and the complaint dismissed.

**C. THE ALJ IMPROPERLY BASED FINDING OF RELEVANCY
ON MS. BISHOP'S ANECDOTAL EVIDENCE.**

Despite the proof of the lack of notice of the Union's purpose for this information request, the proof that prior issues were resolved through the grievance process and the fact that no additional grievance could be filed, the ALJ still found relevancy. In coming to its conclusion, he relied primarily on testimony that neither Ms. Bishop nor any other nurse had seen agency nurses work on a per diem basis. In addition to the hearsay, it is respectfully submitted that her testimony that she did not see agency nurses working is not sufficient proof of contractual violation. That is because as the testimony bore out, the Hospital goes through a process before it engages agency nurses. This process includes offering the overtime to current Columbia Memorial Hospital nurses in order to see if they would like to work these additional hours – for not only overtime but often a bonus pay. Thus, much of the time the overtime is worked by nurses not because they are mandated to do so but because they volunteer for the shift. (See, TT 126-133, testimony of Kelly Sweeney).

Thus, the fact that Ms. Bishop has not seen any agency nurses is not proof that the Hospital was violating the contract, but rather only shows that the Nursing Plan put into place was working. It is submitted, this was an improper basis to determine relevancy, as it is not competent proof of the real issue – Did the Hospital comply with its nursing plan when overtime work was necessitated? Moreover, to allow one nurse's observation to force the Hospital to go back over a year and recount the numerous instances when they

activated the Nursing Plan, is not proper. There was no proof put in that the Hospital had violated the contract, and if it had, those were all resolved in the prior grievance.

Therefore, it is respectfully submitted that this basis for finding relevancy, coupled with the lack of notice renders the ALJ's decision defective. Therefore, it should be reversed and the complaint dismissed.

POINT II

THE HOSPITAL PROVIDED AMPLE PROOF OF THE BURDENSOME NATURE OF THESE DEMANDS WHICH SHOULD HAVE RESULTED IN THE COMPLAINT'S DISMISSAL

The ALJ found that the Respondent had not introduced any evidence to show that the information requested is particularly complex, voluminous or burdensome to provide. It is respectfully submitted that this is not an accurate reflection of the record. As Ms. Kelly Sweeney, the Hospital's Director of Human Resources explained, there was a voluminous and burdensome amount of documentation that needs to be pulled together across several departments to comply with these requests. (See, TT 126-127). Additionally, she testified that the impact on the Hospital is that it would have been burdensome (see, TT 130-132). She further explained the process that the Hospital would have to go through to collect all the information necessary to respond to the demands for one year's worth of mandation data. They would have to go through all their documentation to determine how the issue arose, including review of daily paper call lists to find out why and when people were on leaves of absences, when they came back, a time consuming process which impacts the Hospital's operation. (See, TT-132-33).

Moreover, she also testified that it took 12 days to assemble the information pursuant to Ms. Bishop's March 19, 2014 demand which encompasses only three dates, March 6th, 7th and 18th. To go back a year and try to recreate what happened on a daily basis, particularly here when mandation is already subject to several resolved grievances adds to the burdensomeness of the demand. Notably, it took 12 days for the Hospital to

assemble that information for three days coupled with her explanation of the burdensome nature of the demand, it is submitted provided proof that the information demands were burdensome for the Hospital to respond to. Moreover, Ms. Kelly expressly used the word "burdensome" in her testimony and thus it is submitted that the ALJ mischaracterized her testimony that it would be burdensome for the Hospital to produce.

The burdensome nature of these demands is buttressed by the proof of the lack of relevancy of these demands. In ordering compliance the ALJ has, it is submitted, forced the Hospital to expend numerous hours of its time not engaged in patient care, but collecting information that has no real relevance to the Union. Not only will numerous nursing departments will be impacted, no further grievance can be brought, and for issues that were resolved in prior grievances and on a nunc pro tunc basis that the Union never discussed with the Hospital.

Thus, contrary to the findings of the ALJ, Ms. Sweeney did testify that the demands were burdensome. She also testified to the impact it would have on the Hospital due to the labor intensive process over several nursing departments and Human Resource necessary to respond to these demands.

Therefore, it is respectfully submitted that the Hospital did establish that in addition to the lack of relevancy, it would be burdensome for them to comply with this request. Therefore, it is respectfully submitted that the Hospital did established the burdensome nature of these demands and the complaint should be dismissed on that ground.

Respectfully Submitted:



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